FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMIL CADKIN, an individual;
LILA CADKIN, as trustee of
the CADKIN TRUST,
Plaintiffs-Appellants,

v.

IRMA LOOSE, an individual;
MAY-LOO MUSIC INC., a
California Corporation;
TERENCE LOOSE, as trustee
of the William Loose Family
Trust,
Defendants-Appellees.

No. 08-55311
D.C. No.
CV-03-01591-JVS
OPINION

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
May 8, 2009 – Pasadena, California

Filed June 26, 2009

Before: Betty Binns Fletcher, Raymond C.
Fletcher and
Ronald M. Gould, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

Marty O'Toole, Law Offices of Marty O'Toole, Los Angeles, California, for the plaintiffs-appellants.

Sandra Levin (argued), Michael A. Morguess, Colantuono & Levin, P.C., Los Angeles, California, for defendant-appellee.

Terence Loose, as Trustee of the William Loose Family Trust.

George M. Belfield, Greenberg Traurig, LLP, Santa Monica, California, for defendants-appellees Irma Loose and May-Loo Music, Inc.

OPINION

FISHER, Circuit Judge:

This appeal concerns whether a defendant is entitled to attorney's fees as a prevailing party under § 505 of the Copyright Act, 17 U.S.C. § 505, when a plaintiff voluntarily dismisses without prejudice a lawsuit containing copyright claims. In *Corcoran v. Columbia Broadcasting System, Inc.*, 121 F.2d 575, 576 (9th Cir. 1941), we held a defendant in a copyright suit was a prevailing party and was entitled to attorney's fees when the plaintiff voluntarily dismissed the complaint without prejudice after the district court granted defendant's motion for more definite statement. The Supreme Court, in the context of the Fair Housing Amendments Act (FHAA), has since held prevailing party status turns on whether there has been a "material alteration of the legal relationship of the parties," *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (internal quotation marks omitted), and we have held dismissal without prejudice does not alter the legal relationship of parties for the purposes of entitlement to attorney's fees under a comparable fee

shifting statute, *see Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008).

We conclude *Corcoran* is clearly irreconcilable with *Buckhannon* and no longer good law. We therefore overrule *Corcoran* and hold Buckhannon's material alteration test applies to § 505 of the Copyright Act. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (holding three-judge panel can reject prior panel opinion that is "clearly irreconcilable" with intervening Supreme Court authority). Because the plaintiffs in this lawsuit remained free to refile their copyright claims against the defendants in federal court following their voluntary dismissal of the complaint, we hold the defendants are not prevailing parties and thus not entitled to the attorney's fees the district court awarded them.[1]

I. BACKGROUND

From about 1959 until the 1970s, Emil Cadkin, sometimes solely and sometimes with William Loose, created and recorded thousands of music cues, which

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1 Federal Rule of Civil Procedure 41(a)(1)(B) explains the effect of a plaintiff's voluntary dismissal of an action: "Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." Here, plaintiffs voluntarily dismissed their lawsuit against defendants and had not done so before. Thus, the dismissal was without prejudice.

are short musical works used in television and movies. These cues were administered by GRH Music ("GRH"), a partnership owned by Emil Cadkin and William Loose. In the 1960s, Emil Cadkin authorized William Loose to license the music cues to third parties. At some point, Emil Cadkin formed the Cadkin Trust as owner of all his copyright interests, appointing Lila Cadkin as trustee.

William Loose incorporated May-Loo Music, Inc. to license music he controlled. The proceeds of May-Loo Music, Inc. are split between Irma Loose, William Loose's spouse, and the William Loose Family Trust, which William Loose formed to benefit his children. Terrence Loose is the trustee of the William Loose Family Trust.

In October 2003, Emil Cadkin and Lila Cadkin (as trustee of the Cadkin Trust) (collectively "the Cadkins") filed a complaint in federal district court against Terrence Loose (as trustee of the William Loose Family Trust) ("the Trust") and Irma Loose and May-Loo Music, Inc. (collectively "May-Loo"). The complaint alleged William Loose had removed Emil Cadkin's name as author and GRH's name as publisher from cues Emil Cadkin had composed (on his own or jointly with William Loose), incorporated those cues into the May-Loo music library with William Loose credited as the sole author and then registered those cues with the U.S. Copyright Office, thereby allowing William Loose to obtain the full royalty from the cues' use. The allegations implicated over 5000 cues. The

complaint contained numerous claims for relief, including copyright infringement, false designation of origin (trademark) and various California state law claims.

After extended settlement discussions proved fruitless, the Trust and May-Loo in February 2007 filed motions to dismiss, which the district court granted in part. The district court found the state law claims were preempted by the Copyright Act, dismissing them without prejudice; found the fraud claims were not alleged with sufficient particularity, dismissing them without prejudice; and directed the Cadkins to join certain necessary parties.

The Cadkins thereafter filed a first amended complaint, which contained three claims for relief: (1) copyright infringement, (2) false designation of origin (trademark) and (3) declaratory relief. The Trust and May-Loo again moved to dismiss. The district court, relying primarily on the Cadkins' failure to cite any legal authority in their opposition and insufficient specificity in the amended complaint's factual allegations, granted the motion with leave to amend.

The Cadkins then moved to remand the case to state court, with a second amended complaint appended. The motion admitted "none of the parties herein may own the rights in any of the musical compositions at issue." The district court denied the motion to remand, explaining that remand was not possible when the case had been initiated in federal

court. Thereafter, the parties and the district court treated the second amended complaint as the operative pleading. It contained only state law claims: declaratory judgment, unjust enrichment and accounting for profits.

The Trust and May-Loo again moved to dismiss, arguing the second amended complaint should be dismissed without leave to amend because (1) all three state law claims were preempted by the Copyright Act, (2) the factual allegations lacked specificity and (3) any federal copyright or trademark claims were waived because they were not included in the amended pleading. The Cadkins opposed the motion to dismiss and lodged a notice of voluntary dismissal under Federal Rule of Civil Procedure 41(a). The district court deferred ruling on the Trust's and May-Loo's motions to dismiss until it ruled on the Cadkins' voluntary dismissal, which was eventually entered without comment on the district court docket in October 2007.

The Trust and May-Loo then sought attorney's fees and costs ($205,575 and $101,180, respectively). The Trust later sought an additional $20,000 in fees for work related to the attorney's fees motion and response. At the district court's direction, May-Loo reduced its requested fee to carve out fees attributable to work on a related lawsuit not involving the Cadkins, for a final requested amount of $63,151.20.

The district court granted both motions and entered judgment in favor of the Trust and May-Loo on December 27, 2007, awarding $225,575 to the Trust but not specifying the amount awarded to May-Loo. After denying the Cadkins' motion to reconsider, the court entered a second judgment on February 11, 2008 in favor of May-Loo, specifying an award of $63,151.20. The Cadkins timely appealed.[2]

II. STANDARD OF REVIEW

We review an award of attorney's fees under the Copyright Act for abuse of discretion. *See Traditional Cat Ass'n, Inc. v. Gilbreath,* 340 F.3d 829, 833 (9th Cir. 2003). "A district court abuses its discretion when its decision is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Id.*

III. DISCUSSION

A. Jurisdiction

Initially, we address our jurisdiction to consider the Cadkins' appeal of the order awarding the Trust

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2 Although the district court docket sheet reflects a *filed* date of December 21, 2007 for the judgment awarding the Trust attorney's fees, the docket reflects an *entered* date of December 27. Because December 27 is the date judgment was entered, *see* Fed. R App P. 4(a)(1) & (7); *United States v Depew,* 210 F 3d 1061, 1065 (9th Cir. 2000), the notice of appeal was timely with respect to that judgment, *see* Fed. R App P. 4(a)(4)(A) (stating time to file notice of appeal does not run until district court resolves timely motion to reconsider)

attorney's fees. The Trust maintains we lack jurisdiction because the Cadkins' notice of appeal listed only the February 11, 2008 judgment (and did not explicitly list the December 27, 2007 judgment) on the line specifying the order being appealed. We reject this argument.

[1] "When a party seeks to argue the merits of an order that does not appear on the face of the notice of appeal, we consider: (1) whether the intent to appeal a specific judgment can be fairly inferred and (2) whether the appellee was prejudiced by the mistake." *Le v. Astrue,* 558 F.3d 1019, 1022-23 (9th Cir. 2009) (internal quotation marks omitted). "In determining whether intent and prejudice are present, we consider first, whether the affected party had notice of the issue on appeal; and, second, whether the affected party had an opportunity to fully brief the issue." *Id.* (internal quotation marks omitted).

[2] The notice of appeal refers to "*judgments* re: costs/attorneys' fees" (emphasis added), indicating the Cadkins wished to appeal both the February 11 judgment in favor of May-Loo and the December 27 judgment in favor of the Trust. Moreover, the notice of appeal notification form filed concurrently with the notice of appeal identifies two "12 27 07" items on the line specifying the orders or judgments being appealed, and the Trust had the opportunity to fully brief the propriety of the attorney's fees award on appeal. The Trust plainly had notice the Cadkins were appealing

the judgment in the Trust's favor and had ample opportunity to address the merits of that issue.

B. Attorney's Fees under the Copyright Act

[3] Section 505 of the Copyright Act provides:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505. District courts have two tasks in applying § 505: first, deciding whether an award of attorney's fees is appropriate and, second, calculating the amount of the award. *See Gilbreath,* 340 F.3d at 832-33. District courts have discretion to award attorney's fees to prevailing parties under the Copyright Act, but that discretion is triggered only if the party in fact prevailed on the copyright claim. *See* 17 U.S.C. § 505; *Fantasy, Inc. v. Fogerty,* 94 F.3d 553, 555 (9th Cir. 1996) (holding "an award of attorney's fees to a *prevailing* defendant that furthers the underlying purposes of the Copyright Act is reposed in the sound discretion of the district courts" (emphasis added)).

1. *Prevailing party status under the Copyright Act*

The district court found the Trust and May-Loo were prevailing parties, relying on our 1941 decision in *Corcoran,* 121 F.2d 575. The district court was correct to follow controlling circuit precedent, but we now overrule *Corcoran* because it is "clearly irreconcilable" with the Supreme Court's subsequent decision in *Buckhannon. Miller,* 335 F.3d at 893.

[4] In *Corcoran,* the district court denied defendants' motion to dismiss but granted their motion for a more definite statement on a copyright claim. Rather than amending the complaint, plaintiff voluntarily dismissed without prejudice, and the district court ultimately awarded defendants attorney's fees. We rejected plaintiff's contention that dismissal without prejudice does not confer prevailing party status under the Copyright Act.

> The authority given is not in terms limited to the allowance of fees to a party who prevails only after a trial on the merits. Where, as here, a defendant has been put to the expense of making an appearance and of obtaining an order for the clarification of the complaint, and the plaintiff then voluntarily dismisses without amending his pleading, the party sued is the prevailing party within the spirit and intent of the statute even though he may, at the whim of the plaintiff, again be sued on the same cause of action.

Corcoran, 121 F.2d at 576. Although we have not cited *Corcoran* in subsequent decisions applying the Copyright Act's attorney's fees provision, neither have we overruled or questioned its continuing viability.

[5] In *Buckhannon,* however, the Supreme Court held a plaintiff was not a prevailing party under the FHAA when the "lawsuit brought about a voluntary change in the defendant s conduct" without a "judgment on the merits or a court-ordered consent decree." 532 U.S. at 600. Relying on the definition of prevailing party in Black's Law Dictionary, the Court concluded "a 'prevailing party' is one who has been awarded some relief by the court." *Id.* at 603. The key inquiry is whether some court action has created a "material alteration of the legal relationship of the parties." *Id.* at 604 (internal quotation marks omitted).

[6] In *Oscar,* 541 F.3d at 981, we followed *Buckhannon* in deciding whether an involuntary dismissal without prejudice conferred prevailing party status on the defendant in a lawsuit under the Individuals with Disabilities Education Act. Because "a dismissal without prejudice is not a decision on the merits" and plaintiff was free to re-file his complaint in federal court, "dismissal without prejudice does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing." *Id. Oscar* distinguished *Miles v. California,* 320 F.3d 986 (9th Cir. 2003), in which we applied *Buckhannon* and concluded a dismissal of a claim under the Americans with Disabilities Act (ADA) without prejudice to

plaintiff's right to seek relief in state court did confer prevailing party status on the defendant. This was so because "[t]he dismissal eliminates the federal ADA claim from further proceedings in federal court and thus has changed the legal relationship of Miles with respect to the State." *Id.* at 989; *see Oscar,* 541 F.3d at 982.

[7] We conclude *Corcoran* cannot be reconciled with *Buckhannon*'s material alteration test. First, *Corcoran* focused on the expense the defendants incurred and expressly disregarded that the parties' legal relationship had not changed as a result of the voluntary dismissal. *See Corcoran,* 121 F.2d at 576 (holding defendant to be prevailing party "even though he may, at the whim of the plaintiff, again be sued on the same cause of action"). Second, we construed "prevailing party" in light of the policies underlying the Copyright Act, rather than relying on the plain meaning of the phrase as the Supreme Court did in *Buckhannon. See Buckhannon,* 532 U.S. at 607, 121 S.Ct. 1835 (suggesting legislative history would not overcome plain meaning of "prevailing party"). Although the Trust and May-Loo are correct that *Buckhannon* was not a copyright case, the distinction is immaterial. As discussed, we have understood the Court's construction of "prevailing party" applies to federal fee shifting statutes other than the FHAA that contain that phrase, which is appropriate given the Court's reliance on a dictionary definition for its holding. *See Buckhannon,* 532 U.S. at 603.

[8] Accordingly, we hold the material alteration test the Supreme Court articulated in *Buckhannon* governs the prevailing party inquiry under § 505 of the Copyright Act and overrule *Corcoran* to the extent it is inconsistent with *Buckhannon*. *See Miller*, 335 F.3d at 893. Our holding is consistent with every circuit court that has considered whether *Buckhannon* governs prevailing party status under the Copyright Act. *See, e.g., Riviera Distribs., Inc. v. Jones*, 517 F.3d 926, 928 (7th Cir. 2008) (holding voluntary dismissal with prejudice of copyright claims confers prevailing party status on defendants under *Buckhannon*); *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 164 & n. 9 (1st Cir. 2007) (holding *Buckhannon* material alteration test applies to copyright claims and concluding dismissal for lack of subject matter jurisdiction does not confer prevailing party status); *see also Bridgeport Music, Inc. v. London Music, U.K., 226 F. App'x 491, 493-94 (6th Cir. 2007)* (unpublished) (applying *Buckhannon* to copyright claims).

2. *Material alteration in legal relationship*

[9] This was the Cadkins' first voluntary dismissal of copyright claims against the Trust and May-Loo. Although the notice of dismissal did not state whether the voluntary dismissal was with or without prejudice, "[u]nless the notice or stipulation states otherwise, [a first voluntary] dismissal is without prejudice." Fed.R.Civ.P. 41(a)(1)(B); *see also City of S. Pasadena v. Mineta*, 284 F.3d 1154, 1157 & n.2 (9th Cir. 2002) (noting first voluntary dismissal is without prejudice

unless otherwise specified). The Cadkins' voluntary dismissal "does not alter the legal relationship of the parties because [the Trust and May-Loo] remain[] subject to the risk of refiling" following a dismissal without prejudice. *Oscar*, 541 F.3d at 981. We therefore hold the Trust and May-Loo are not prevailing parties and are not entitled to attorney's fees. *See id.* at 982.

We are not persuaded by either of the Trust's and May-Loo's arguments why *Oscar* does not control here. First, the Trust and May-Loo maintain the legal relationship between the parties changed because the Cadkins waived the copyright claim by omitting it from the second amended complaint, making the voluntary dismissal equivalent to a dismissal with prejudice as to that claim. Although we have consistently held "all causes of action alleged in an original complaint which are not alleged in an amended complaint are waived," *Marx v. Loral Corp.*, 87 F.3d 1049, 1055 (9th Cir. 1996) (internal quotation marks and alteration omitted), we have never applied this waiver rule to a new lawsuit filed after a voluntary dismissal without prejudice. In fact, we have squarely held waiver in one lawsuit does not carry over to a subsequent lawsuit following a voluntary dismissal without prejudice under Rule 41(a). In *City of South Pasadena*, 284 F.3d at 1156, the city filed a lawsuit against the state of California, which failed to invoke sovereign immunity, but the city then voluntarily dismissed the lawsuit without prejudice and filed a new cause of action containing many of the same claims. When the state invoked sovereign immunity in the second lawsuit, the district court found

the state had waived that defense by failing to assert it in the original lawsuit. *See id.* On appeal, we held the state had waived immunity in the prior lawsuit, but that waiver had no effect on the new lawsuit following the voluntary dismissal: "The city . . . voluntarily dismissed [the first] action pursuant to [Rule] 41(a)(1)(ii). This was the city's first voluntary dismissal, and it was therefore without prejudice. Such a dismissal leaves the situation as if the action never had been. . . . We have adhered slavishly to this interpretation of Rule 41(a)." *Id.* at 1157 (internal quotation marks and footnote omitted). Rejecting the city's argument that there is no categorical rule that waiver of sovereign immunity cannot carry over to a subsequent action, we held "[Rule] 41(a)(1) provides a categorical rule that is much broader-one that disallows the 'carry-over' of *any* waivers from a voluntarily dismissed action to its reincarnation." *Id.* at 1158. The Trust's and May-Loo's attempt to differentiate between waiver of affirmative defenses and waiver of claims is a distinction without significance in light of our characterization of Rule 41(a) as a *categorical* rule.

The Trust and May-Loo also argue the district court's two prior dismissals of the copyright claims are sufficient to confer prevailing party status on them, relying on *Watson v. County of Riverside,* 300 F.3d 1092, 1093 (9th Cir. 2002) (upholding attorney's fees award to plaintiff who had obtained preliminary injunction, but no other relief). Their reliance on *Watson* is misplaced. There, plaintiff obtained a preliminary injunction to prevent his government

employer from presenting certain information at an administrative termination hearing, but his claim for permanent injunctive relief became moot when the administrative hearing was completed. *See id.* at 1094. "Having succeeded in winning a preliminary injunction that prevented the use of his report at the administrative hearing, [plaintiff] obtained significant, court-ordered relief that accomplished one of the main purposes of his lawsuit." *Id.* at 1096. The change in the employer's behavior "carrie[d] all the 'judicial imprimatur' necessary to satisfy *Buckhannon*." *Id.*; *see also Buckhannon,* 532 U.S. at 603, 121 S.Ct. 1835 (holding " 'a prevailing party' is one who has been awarded some relief by the court"). In contrast, the Trust and May-Loo remain subject to the risk that the Cadkins will refile their copyright claims, despite the district court's orders dismissing without prejudice the original complaint and first amended complaint and the voluntary dismissal without prejudice of the second amended complaint. The Cadkins have not been deprived of the ability to seek relief in federal court against the Trust and May-Loo under the Copyright Act.

IV. CONCLUSION

Miles and *Oscar,* taken together, compel the conclusion that a defendant is a prevailing party following dismissal of a claim if the plaintiff is judicially precluded from refiling the claim against the defendant in federal court. That is not the circumstance here, so the Trust and May-Loo are not prevailing parties and

the district court erred in awarding them attorney's fees.

REVERSED.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMIL CADKIN, an individual, LILACADKIN, as Trustees of the CADKIN TRUST,

Plaintiffs - Appellants

v.

IRMA LOOSE, an individual; MAY-LOO MUSIC INC., a California corporation; TERENCE LOOSE, as trustee of the William Loose Family Trust,

Defendants – Appellees.

No. 08-55311

D.C. No. CV-03-01591-JVS

Central District of California, Los Angeles

ORDER

Before: B. FLETCHER, FISHER and GOULD, Circuit Judges.

The panel judges voted to deny Appellee's petition for rehearing en banc. Judges Fisher and Gould voted to deny the suggestion for rehearing en banc, and Judge Fletcher recommended denying the suggestion for rehearing en banc.

The full court has been advised of the

suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc Fed. R. App. P. 35.

Appellee's petition for rehearing and suggestion for rehearing en banc, filed August 11, 2009, is DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No. SACV 03-1591-JVS (SHx) Date February 1, 2008

Title: Emil Cadkin v. Irma Loose, et al.

Present: The Honorable James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order Denying Reconsideration of Award of Fees

Plaintiffs Emil Cadkin, an individual, and Emil and Lila Cadkin as trustees of the Cadkin trust (collectively "Cadkin") move this Court to reconsider its Order, dated December 21, 2007, awarding attorneys fees and costs to defendant Terence Loose, as trustee of the William Loose Family Trust, ("Loose") and Defendants Irma Loose and May-Loo Music, Inc. (collectively "May-Loo"), pursuant to Local Rule 7-18 and Federal Rules of Civil Procedure 59(e) and 60(b). Loose and May-Loo oppose the motion.

I. Legal Standard

Pursuant to Rule 60(b), the Court may relieve a party from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud . . ., misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

Local Rule 7-18 directs that a motion for reconsideration may only be made on grounds of

> (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the

> party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

L.R. 7-18. "No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." Id.

Absent "highly unusual circumstances," reconsideration is proper only if the Court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." School Dist. No. 1J, Multnomah County, Or. v. ACandS. Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration cannot be based on evidence that could reasonably have been presented prior to the Court's ruling. Hopkins v. Andaya, 958 F.2d 991, 887 n.5 (9th Cir. 1992).

II. Discussion

On December 21, 2007, this Court ordered Cadkin to pay Loose's and May-Loo's costs and attorneys' fees in the amounts of $225,575 and $63,151.20, respectively, pursuant to the Copyright

Act. (Order, Docket No. 112, p. 6; 15 U.S.C. § 505.) The award was based on a finding that Cadkin's allegations were objectively unreasonable and frivolous and that an award of fees would deter Cadkin from bringing similarly unreasonable and frivolous claims in the future. (Id. pp. 2-3.)

Cadkin brings this motion for reconsideration based primarily on his contention that the Court erred in failing to consider "facts and allegations" that Cadkin composed the musical pieces at issue. (Opening Br. p. 4-6.) In support of this contention, Cadkin submits various documents that purportedly indicate Cadkin as a composer of various musical pieces. (Id. Ex. B.)

Cadkin misunderstands this Court's Order. Whether or not Cadkin composed any of the pieces at issue, he admitted on the record "that he does not own copyrights to any of the musical pieces at issue." (Order, p. 3, citing Motion to Remand, p. 2, Docket No. 72.) The Court stated that "[g]iven that Cadkin has provided no evidence that he was the copyright owner for any of the musical works at issue and now as much as admits that he is not the owner, the Court finds that the claims pled were frivolous." (Id.) Cadkin is only entitled to recover under the Copyright Act if he owns copyrights to the works at issue. He has presented no new facts or evidence that he owns the relevant copyrights. There is no reason, therefore, to reconsider the Order, which was based on Cadkin's admission that

he is not and was never entitled to recovery based on his allegations.

Moreover, to the extent that the documents submitted with Cadkin's brief can be considered evidence in support of his contention that his claims are not unreasonable or frivolous, Cadkin provides no justification for his delay in presenting them to the Court. Therefore, the Court finds that the new evidence, to the extent there is any, could have been presented to the Court before the prior Order and therefore is not a proper basis for a motion to reconsider. Hopkins, 958 F.2d at 887 n.5.

Furthermore, the Court rejects Cadkin's assertion that his claims are not objectively unreasonable and frivolous because he is able to assert them in state court. (Opening Br. p. 8.) Whether or not this is accurate,[3] it is irrelevant since the Court awarded Loose and May-Loo attorneys' fees and costs incurred in connection with Cadkin's protracted federal court action, based on a federal copyright claim that he has admitted had no factual or legal basis.

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3 The question of whether the claims in Cadkin's state court complaint are preempted by federal copyright law is not properly before the Court, and so the Court declines to address it.

III. Conclusion

The Court finds that Cadkin has not presented any newly discovered evidence, that the Court did not commit clear error, and that its prior Order was not manifestly unjust, and therefore, accordingly denies Cadkin's motion for reconsideration.

The Court finds oral argument would not be helpful on this matter, and therefore removes the February 4, 2008 hearing from its calendar. Fed. R. Civ. P. 78; L-R 7-15.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	SACV 003-01591-JVS (SHx)	Date	December 18, 2007

Title: Emil Cadkin, et al. v. Irma Loose, et al.

Present: The Honorable James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order Granting Defendant Irma Loose and MayLoo Music Inc.'s Motion for Attorneys' Fees and Costs (Fld 10-18-07) Order Granting Defendant Terence Loose as Trustee of the William Loose Family Trust's Motion for Attorneys' Feels and Costs (Fld 10-18-07) Order Denying Defendants' Joint Motion for Sanctions against Martin O'Toole personally (Fld 10-18-07)

Defendant Terence Loose, as trustee of the William Loose Family Trust, ("Loose") and Defendants

Irma Loose and May-Loo Music, Inc. (collectively "May-Loo") each apply to this Court for fees and costs pursuant to 17 U.S.C. § 505, in the amounts of $225,575 and $63,101.20, respectively, to be paid by Plaintiffs Emil Cadkin, an individual, and Emil and Lila Cadkin as trustees of the Cadkin trust (collectively "Cadkin"). Loose also moves for sanctions in the amount of $43,031.34 against Cadkin's attorney, Martin O'Toole, personally pursuant to 28 U.S.C. § 1927, and May-Loo joins that motion, requesting $20,195.98 in sanctions. Cadkin opposes the requests for fees and sanctions.

I. Legal Standard

The Copyright Act of 1976 provides that:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C.S. § 505.

II. Discussion

a. Prevailing Party

The same standards apply irrespective of whether the prevailing party is a plaintiff or defendant. Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994). Where the "defendant has been put to the expense of making an appearance and of obtaining on order for the clarification of the complaint, and the plaintiff then voluntarily dismisses without amending his pleading, the party sued is the prevailing party within the spirit and intent of the statute." Corcoran v. Columbia Broadcasting System, Inc., 121 F.2d 575, 576 (9th Cir. 1941).

In this case, Cadkin voluntarily dismissed the case pursuant to Federal Rule of Civil Procedure 41(a) on October 4, 2007, after Loose and May-Loo had filed and served a motion to dismiss Cadkin's Second Amended Complaint.[4] (Docket No. 91.) The parties appeared in Court for an oral hearing on that motion to dismiss on September 17, 2007. In light of Cadkin's voluntary dismissal, the Court ultimately found the motion to dismiss moot.

Therefore, the Court finds that Loose and May-Loo are prevailing parties for the purposes of 17 U.S.C. § 505.

b. Fogerty Factors

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4 The court notes that this was the fifth motion to dismiss filed by Loose and May-Loo in this action. (Paspalis Decl ¶ 20).

A court may look to various factors in exercising its discretion to award fees, including the objective unreasonableness of the claims, frivolousness, motivation, and the need in particular circumstances to advance considerations of compensation and deterrence. Fogerty, 510 U.S. at 534 n.19 (1994) (citing Lieb v. Topstone Industries. Inc., 788 F.2d 151, 156 (3rd Cir. 1986)).

Allegations that are not supported by fact or law are objectively unreasonable. Batjac Productions. Inc. v. Goodtimes Home Video Corp., 44 U.S.P.Q.2d 1788, 1790 (C.D. Cal. 1997). Cadkin has admitted to this Court that he does not own copyrights to any of the musical pieces at issue. (Motion to Remand, p. 2, Docket No. 72.) The claims stated in Cadkin's various complaints turned on Cadkin's allegation that he composed various musical pieces. (Opening Br. p. 14.) These allegations have never been substantiated by any evidence. (Id.) Indeed, this Court found that the contention the Cadkin composed the pieces was objectively unreasonable when it awarded fees to Jack Cookerly, the defendant in a parallel suit, in 2003. (Castleman. et al. v. Loose, SACV 03-460 JVS (SHx), Order Granting Defendant Jack Cookerly's Motion for Attorney's Fees and Costs, July 23, 2003, Docket No. 69.) Accordingly, the Court finds that Cadkin's claims were objectively unreasonable and that there is a basis for an award of fees under § 505.

The other Fogerty factors are not required in order to justify a fee award, but weigh in favor of such

an award. Fantasy, Inc. v. Fogerty, 94 F.3d 553 at 558 (9th Cir. 1996) (construing Fogerty v. Fantasy. Inc., 510 U.S. 517 (1994)). Given that Cadkin has provided no evidence that he was the copyright owner for any of the musical works at issue and now as much as admits that he is not the owner, the Court finds that the claims pled were frivolous. Moreover, the Court finds that an award of fees in this case would serve the purpose of deterring Cadkin from bringing similarly unreasonable and frivolous claims in the future. See, Maliack Prods. v. Palisades Entertainment, 36 U.S.P.Q.2D 1281 (D. Cal. 1995).

Therefore, the Court finds that an award of fees and costs is justified under § 505 in this case.

c. Reasonable Fees

To determine reasonable attorneys' fees under section 505, courts must first calculate the lodestar amount. See Fogerty v. Fantasy, 510 U.S. 517, 534 (1994) (citing Hensley v. Eckerhart, 461 U.S. 424, 433-37 (1983)). The lodestar is the number of hours reasonably expended on the litigation multiplied by the reasonable hourly rate. McGrath v. County of Nevada, 67 F.3d 248, 252 (9th Cir. 1995). Courts may adjust the lodestar fee based on factors not subsumed within the initial calculation of the lodestar, but there is a strong presumption that the lodestar figure represents a reasonable fee. Hensley, 461 U.S. at 433-37. Courts should calculate the reasonable hourly rate "according to the prevailing market rates in the relevant

community," Blum v. Stenson, 465 U.S. 886, 895 (1984), which typically is the community "in which the district court sits." Davis v. County of Mason, 927 F.2d 1473, 1488 (9th Cir. 1991).

i. Loose

Loose's counsel submitted billing records and other documentation of fees in the amount of $184,249 and costs in the amount of $21,326 incurred by Loose during the period from November 3, 2003 to October 1, 2007. (Levin Decl. Ex. D) The amounts are based on a lodestar calculation of a total of 771.40 hours billed by five attorneys and four paralegals over the four year period. (Id.) While the fees incurred in this matter were billed to the same account as those incurred in the related Castleman matter, Loose's counsel represents that, in large part, given the common issues among the matters the fees would have been incurred even if only for this matter alone. (Id. ¶9.) Moreover, Loose's counsel has deducted amounts that are attributable only to the Castleman matter. (Id.)

Loose's counsel submitted a supplemental declaration containing an estimate of additional fees and costs in the total amount of $20,000 incurred in after October 1, 2007, in connection with this motion. (Supp. Paspalis Decl. ¶ 2.) This estimate is based on 105 hours billed by three attorneys for work in preparing the papers for this motion and appearing at the oral hearing. (Id.)

The Court finds that the number of hours billed is reasonable. The Court also finds that the rates of $175 - $225 charged by Ms. Levin and the other attorneys at Colantuono & Levin, PC are entirely reasonable given the prevailing rates for similar services in the Los Angeles area. (Id. ¶ 11.) The Court sees no basis to adjust the lodestar amount as presented by Ms. Levin or Ms. Paspalis's estimate. Finally, the Court finds that the costs incurred in the amount of $21,326.07 are reasonable. Therefore, the Court awards Loose the full amount of fees and costs sought: $225,575

ii. May-Loo

May-Loo's counsel submitted billing records documenting fees in the amount of $57,710.50 and costs in the amount of $1,720.70 incurred from January 1, 2005 through October 18, 2007, and an estimate of an additional $3,720 in fees incurred in connection with the preparation and hearing of this motion. (Supp. Belfield Decl. ¶ 2, Ex. A.) Mr. Belfield's billing records indicate fees attributable only to the Cadkin matter and exclude fees incurred in connection with the related Great matter. (Id. ¶ 4.) The amount of costs sought is one-half of the total costs incurred for the related cases. (Id.) The Court is satisfied with this calculation of the appropriate lodestar amount. Further, the Court believes, and Cadkin's counsel does not dispute, that May-Loo has established the reasonableness of counsel's rates.

The Court appreciates Cadkin's counsel's observation that there is a disparity in the fee amounts requested by May-Loo's and Loose's counsel. (Supp. O'Toole Decl. pp. 3-4.) In fact, however, it seems that the disparity in lodestar amounts actually reflects an economy of scale at work in May-Loo's and Loose's counsel's representation of the co-defendants. For example, instead of filing a separate motion for sanctions, May-Loo's counsel simply filed a joinder in Loose's motion. Accordingly, the Court is satisfied that the records submitted by each co-defendant's counsel accurately reflect the respective fees incurred.

Therefore, the Court awards May-Loo the full amount of fees and costs sought: $63,151.20.

d. Sanctions

Loose and May-Loo each seek sanctions against Cadkin's current counsel, Martin O'Toole, Esq. pursuant to 28 U.S.C. § 1927 and, in May-Loo's case, pursuant to Federal Rule of Civil Procedure 11.

First, the Court notes that while this matter has been ongoing for many years, Mr. O'Toole was only substituted as counsel on November 16, 2006. (Docket No. 39.) Thus, much of the conduct on which the Court bases its award of fees and costs, above, was not under Mr. O'Toole's control. Moreover, to the extent that May-Loo requests sanctions under Rule 11, the Court finds that they are not available because Mr. O'Toole was never provided with notice and the requisite

twenty-one day safe harbor period to cure. (Fed. R.Civ. P. 11.)

While § 1927 permits a Court to sanction attorney who "multiples the proceedings in any case unreasonably and vexatiously," "the imposition of sanctions under Section 1927 requires a finding of bad faith." 28 U.S.C. § 1927; Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1118 (9th Cir. 2000). The Court does not find that Martin O'Toole, Esq. personally deliberately acted in bad faith in this matter. Particularly in light of the protracted history of litigation that preceded Cadkin's retention of Mr. O'Toole as counsel, the Court finds that an award of sanctions against Mr. O'Toole personally is unwarranted.

ii. May-Loo

In sum, the Court grants Loose's application for fees and costs, and awards the full amount sought: $225,575. The Court grants May-Loo's application for fees and costs, and awards the full amount sought: $63,151.20. The Court denies Loose and May-Loo's joint motion for sanctions against Martin O'Toole personally in its entirety.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No. SACV 03-1591-JVS (SHx) Date September 17, 2007

Title: Emil Cadkin v. Irma Loose, et al.

Present: The Honorable James V. Selna

Karla J. Tunis	Jane Rule
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Martin O'Toole	Sandra Levin Katherine Paspalis George Belfield

Proceedings: 1.) Defendant Terence Loose, etc.'s Motion to Dismiss Plaintiff's Second Amended Complaint (Fld 8-27-07)
2.) Defendants Irma Loose and May Loo Music's Joinder in Terence Loose's Motion to Dismiss Plaintiff's 2nd Amended Complaint (Fld 8-28-07)

Cause called and counsel make their appearances. The Court's tentative ruling is issued. Counsel make their arguments. The Court directs

defendants to file a memorandum regarding the intervening plaintiff's 41(a)(1) dismissal that has been lodged with the Court. The above referenced motions are under taken under submission until ruling is made on the plaintiff's 41(a)(1) dismissal.

Emil Cadkin et al. v. May-Loo Music, Inc. et al., SACV 03-1591-JVS (SHx)

Tentative Order Granting Motion to Dismiss

Defendants May-Loo Music, Irma Loose, and Terence Loose, as trustee of the William Loose Family Trust (collectively, "May-Loo") seek an order dismissing the Second Amended Complaint ("SAC") of Plaintiffs Emil and Lila Cadkin, as trustees of the Cadkin Trust (collectively "Cadkin"). Cadkin has not opposed the motion.

I. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955,1 974 (2007). In resolving a Rule 12(b)(6) motion, the Court must construe the Complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). The Court must also accept as true all reasonable inferences to be drawn from the material allegations in the Complaint. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998).

II. DISCUSSION

A. Background

Cadkin alleges the following. From about 1959 through the 1970's, Cadkin, sometimes solely and sometimes with William Loose, created and recorded thousands of music cues. These music cues were administered by GRH music, a partnership owned jointly by Cadkin and Loose. In the 1960's, Cadkin authorized Loose to license the music cues to third parties through the Capital Records Music Library Department. Thereafter, Loose, unbeknownst to Cadkin, licensed rights to use music cues in the GRH Catalogue to other parties, including May-Loo. Loose failed to credit Cadkin as the author or co-author in many of the license agreements entered into by Loose. Instead, Loose listed himself as the sole author, or as co-author with other composers, allowing Loose to receive income deriving from the GRH Catalogue. Loose did not remit any such income to Cadkin. Loose then altered documents associated with the GRH Catalogue to eliminate Cadkin as author or co-author, and listed Loose as the sole author with May-Loo as the publisher. Loose also renamed and reregistered the Cadkin's works with the U.S. Copyright Office, listing himself as the sole composer and owner.

Cadkin further alleges that, after William Loose's death, Irma Loose and the Loose trust continued to license and profit from recordings in which Cadkin has an ownership interest. Cadkin claims that each Defendant fraudulently concealed their conduct and did not communicate their repudiation of Cadkin's interest until within three years of the filing of the complaint.

B. Cadkin's failure to oppose the motion

Many of the arguments on the instant motion are familiar. This motion seeks to dismiss Cadkin's Second Amended Complaint.

Pursuant to Local Rule 7-9, Cadkin was to serve and file his opposition on or before September 3, 2007. Cadkin has failed to respond to counsel's attempts to meet and confer as required by Local Rule 7-3, has failed to respond to the instant motion, and has failed to timely respond to the Court's telephonic inquiries. In this Court's August 8, 2007 Order taking May-Loo's prior motion to dismiss off calendar for failure to comply with Local Rule 7-3, the Court stated:

> Should the parties fail to resolve their differences at the 7-3 conference by an agreement to cure any apparent defects, the Court expects that May-Loo will tailor a motion to dismiss to address matters not already addressed by its prior motions to dismiss, and that Cadkin will respond to those contentions with substantive argument and legal support.

Cadkin has failed to respond at all, much less with the requisite substantive argument and legal support. Cadkin has accordingly violated this Court's August 8, 2007 Order, and Local Rules 7-3 and 7-9. Under Local Rule 7-12, failure to file required papers "may be deemed consent to the granting or denial of the motion." See, e.g.,

Moore v. La Habra Relocations, Inc., 2007 WL 2269818 at * 1 (C.D. Cal. August 8, 2007). The Court deems Cadkin's failure to oppose the motion as consent to granting the motion.

C. The merits of the motion

The Court reaches the same conclusion on the merits.

The SAC includes state law claims that are not substantively distinguishable from copyright infringement. The state law claims are therefore preempted by the Copyright Act. See 17 U.S.C. § 301; Del Madera Props. v. Rhodes & Gardner, Inc., 820 F.2d 973, 976 (9th Cir. 1987).

Because all the claims of the SAC are grounded in fraud, the heightened pleading standards of Federal Rule of Civil Procedure 9(b) apply to the entire SAC. However, the underlying conduct alleged to be fraudulent is not pled with the requisite specificity. Despite the Court's specific instructions in the August 8, 2007 Order, the SAC still fails to specifically aver the time, place, and content of the alleged misrepresentations or omissions; identify what individuals made the alleged misrepresentations or omissions; or allege with particularity the musical works at issue. This is an independent ground for dismissing the action with prejudice under Rule 12(b)(6). See, e.g., Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 88 (2d Cir. 1961) (affirming denial of leave to amend, noting that, though leave to amend shall be freely given when justice so

requires, "surely that freedom must diminish as the litigation progresses").

Cadkin's copyright claim was previously abandoned, and cannot now be reasserted in the SAC *London v. Coopers Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).

II CONCLUSION

For the aforementioned reasons, the Court grants the motion without leave to amend.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No. SACV 03-1591-JVS (SHx) Date July 10, 2007

Title: Emil Cadkin v.
Irma Loose, et al.

Present: The Honorable James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order Denying Plaintiff's Motion to Remand

Plaintiffs Emil Cadkin and Lila Cadkin as trustees of the Cadkin Trust (collectively "Cadkin") move the Court to remand this case to state court. Cadkin asserts that the "improprieties [which Cadkin has unearthed] are better resolved in state court." (Motion, p. 2.) Cadkin's proposed Second Amended Complaint states only state causes of action (Motion, Amended Complaint.)

The difficulty with the present Motion is that the case was never in state court. The action was initiated in this Court with a Complaint filed October 22, 2003. The

Court has neither statutory nor case law power to send a case to state court which was initiated in federal court, and none of the authorities cited by Cadkin support such an action. Indeed, Cadkin's authorities point up the need for a prior removal:

> In *Carnegie-Mellon*, the Court, in a reaffirmance of *United Mine Workers v. Gibbs*, 383 U.S. 715,86 S.Ct. 1130,16 LEd.2d 218 (1966), held that a district court has discretion to remand a properly removed case to state court when none of the federal claims are remaining, "upon a proper determination that retaining jurisdiction over the case would be inappropriate." 484 U.S. at 357,108 S.Ct. at 622.

Harrell v. 20th Century Ins. Co., 934 F.2d 203, 205 (9th Cir. 1991) (emphasis supplied).

The Motion is denied.

Pursuant to Federal Rule of Civil Procedure 78 and Local Rule 7-15, the Court deems the matter submitted without oral argument, and removes the July 30, 2007 hearing from its calendar.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No. SACV 03-1591-JVS (SHx) Date May 31, 2007

Title: Emil Cadkin v. Irma Loose, et al.

Present: The Honorable James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order Granting in Part and Denying in Part Defendants May Loo Music, Inc. And Irma Loose's Motion to Dismiss 1st Amended Complaint (Fld 5-11-07) [Joinder by Terence Loose(fld 5-11-07)] AND Defendant Terrence Loose, etc.'s Motion to Mismiss 1st Amended Complaint or in the alternative, an order for more definite statement (Fld 5-11-07)

Defendants May-Loo Music, Irma Loose, and Terence Loose, as trustee of the William Loose Family

Trust (collectively, "May-Loo") seek an order dismissing the First Amended Complaint ("FAC") of Plaintiffs Emil and Lila Cadkin, as trustees of the Cadkin Trust (collectively, "Cadkin"). Cadkin opposes the motions.

Many of the arguments raised by May-Loo duplicate arguments it raised in its prior motion to dismiss Cadkin's original Complaint, such as the contention that this Court lacks subject matter jurisdiction pursuant to 17 U.S.C. section 411(a) and that Cadkin's claims are barred by res judicata principles.

Nonetheless, Cadkin's opposition makes no legal argument whatever, and fails to cite to a single source of legal authority. As the Ninth Circuit has held, "[w]e require contentions to be accompanied by reasons." Independent Towers of Washington v. Washington, 350 F.3d 925, 930 (2003). "The art of advocacy is not one of mystery. Our adversarial system relies on the advocates to inform the discussion and raise the issues to the court." Id. at 929. This Court similarly "cannot manufacture arguments" on behalf of Cadkin. Id.

As a result, the Court grants May-Loo's motions in part and dismisses the FAC with leave to amend. Specifically, the Court dismisses the FAC for failure to allege sufficient facts; for failure to plead fraud with specificity; for failure to state a claim for copyright infringement; for failure to state a claim for false designation of origin; and for failure to state an adequate

claim for declaratory relief. The Court otherwise denies May-Loo's motions.

Should Cadkin amend its pleading, Cadkin shall provide specific identifying information as to the music at issue, including detailed allegations of ownership, and whether Cadkin registered or attempted to register specific works in Cadkin's name; provide specific allegations of any fraudulent conduct; and provide specific allegations identifying the infringing acts.

Cadkin shall have twenty days from the issuance of this Order to file an amended pleading. The Court further finds that oral argument would not be helpful on this matter, and vacates the June 4, 2007 hearing. Fed. R. Civ. P. 78; L.R. 7-15.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No. SACV 03-1591-JVS (SHx) Date March 19, 2007

Title: Emil Cadkin v. Irma Loose, et al.

Present: The Honorable James V. Selna

Steve Chung	Sharon Seffens
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Martin O'Toole	Sandra Levin George Belfield

Proceedings: 1.) Defendantss Irma Loose and May Loo Music's Motion to Dismiss and or for Summary Judgement (Fld 2-13-07).
2.) Defendant Terence Loose, etc.'s Joinder in Defendants Irma Loose and May-Loo Music's Motion to Dismiss (Fld 2-13-07)

Cause called and counsel make their appearances. Tentative ruling issued. Counsel submit on the tentative ruling. The Court denies in part and grants in part on the

Motion to Dismiss and/or for Summary Judgment in accordance with tentative as follows:

Defendants May-Loo Music, Irma Loose, and Terence Loose, as trustee of the William Loose Family Trust (collectively, "May-Loo") seek dismissal of and/or summary judgement on the Complaint of Plaintiffs Emil and Lila Cadkin, as trustees of the Cadkin Trust (collectively, "Cadkin"). Cadkin opposes the motion.

I. LEGAL STANDARDS

A. Failure to state a claim

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss will not be granted unless it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In resolving a Rule 12(b)(6) motion, the Court must construe the Complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). The Court must also accept as true all reasonable inferences to be drawn from the material allegations in the Complaint. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998).

B. Summary judgment

Summary judgment is appropriate only where the record, read in the light most favorable to the non-moving

party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." (Id. at 248.) In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." (Id. at 255.)

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. If and only if the moving party meets its burden, then the non-moving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. (See id. at 322-23.) If the non-moving party meets this burden, then the motion will be denied. Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000).

C. Rule 19

Rule 19(a) of the Federal Rules of Civil Procedure requires that necessary parties be joined if feasible, and Rule 19(b) requires that a suit be dismissed if indispensable parties are not joined. See Diabled Rights

Action Committee v. Las Vegas Events, Inc., 375 F.3d 861, 867 n.5 (9th Cir. 2004).

Under Rule 19(a), a person shall be joined if possible if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Under Rule 19(b), if a person meets the requirements of 19(a), but cannot be joined,

> the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in

> the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Under 19(a)(1), a party is necessary if complete relief cannot be granted in its absence. "This factor is concerned with consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action." Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030,1043 (9th Cir. 1983). The court is to inquire whether the absence of the party would preclude the district court from fashioning meaningful relief as between the parties. Id.

Under 19(a)(2), the court asks whether the absent party's participation is necessary to protect its legally cognizable interests or to protect other parties from a substantial risk of incurring multiple or inconsistent obligations because of those interests. Las Vegas Events, 375 F.3d at 880.

II. DISCUSSION

A. Background

Cadkin alleges the following. From about 1959 through the 1970's, Cadkin, sometimes solely and sometimes with William Loose, created and recorded thousands of music cues. These music cues were administered by GRH music, a partnership owned jointly

by Cadkin and Loose. In the 1960's, Cadkin authorized Loose to license the music cues to third parties through the Capital Records Music Library Department. Thereafter, Loose, unbeknownst to Cadkin, licensed rights to use music cues in the GRH Catalogue to other parties, including May-Loo. Loose failed to credit Cadkin as the author or co-author in many of the license agreements entered into by Loose. Instead, Loose listed himself as the sole author, or as co-author with other composers, allowing Loose to receive income deriving from the GRH Catalogue. Loose did not remit any such income to Cadkin. Loose then altered documents associated with the GRH Catalogue to eliminate Cadkin as author or co-author, and listed Loose as the sole author with May-Loo as the publisher. Loose also renamed and reregistered the Cadkin's works with the U.S. Copyright Office, listing himself as the sole composer and owner.

Cadkin further alleges that, after William Loose's death, Irma Loose and the Loose trust continued to license and profit from recordings in which Cadkin has an ownership interest. Cadkin claims that each Defendant fraudulently concealed their conduct and did not communicate their repudiation of Cadkin's interest until within three years of the filing of the complaint.

May-Loo alleges that Cadkin assigned all of its rights, title, and interest in Cadkin's portion of the GRH Catalogue to Don Great and Don Great Music (collectively, "Don Great Music"). In 2005, Carbert Music Inc. and Carlin Recorded Music Library Ltd.

(collectively, "Carbert") sued Don Great Music in U.S District Court for the Southern District of New York, claiming ownership of the GRH Catalogue, among other things. Don Great Music failed to appear and Carbert received a default judgment declaring that Carbert "is the owner of all right, title and interest in the GRH works". (Belfield Decl., Ex. A ¶9.)

B. Rule 19

May-Loo contends that Cadkin's failure to join Carbert and Don Great Music requires this Court to dismiss Cadkin's complaint pursuant to Rule 19 of the Federal Rules of Civil Procedure.

Here, Cadkin seeks a variety of remedies, including declaratory relief regarding Cadkin's alleged authorship and co-ownership of the Cadkin Compositions and Cadkin Sounds Recordings (Compl. ¶¶ 26-30,35-39); an accounting for sums received from the alleged exploitation of Cadkin's interest in the Cadkin Compositions (Compl. ¶¶ 31-34); damages resulting from alleged copyright infringement, fraud, violations of common law and statutory unfair competition, violations of California Civil Code Section 980, and false designation of origin (Compl. ¶¶ 40-71); and declaratory relief and an accounting regarding Cadkin's interest in the GRH catalogue. (Compl ¶¶ 72-76.)

The Court agrees with May-Loo that, under 19(a)(2), a favorable judgment for Cadkin would impair Carbert's and Don Great Music's ability to protect their

ownership interest, and would leave May-Loo subject to a substantial risk of inconsistent obligations. Carbert has received a default judgment regarding rights to much, if not all, of the recordings and compositions in dispute. Should May-Loo be found liable to Cadkin for remittances, for instance, it would be subject to inconsistent obligations to both Cadkin and Carbert for the same alleged acts.

Accordingly, the Court finds that Carbert and Don Great Music are necessary parties to the instant action, and orders Cadkin to amend its complaint to join Carbert and Don Great Music.

C. Rule 9(b)

May-Loo contends that Cadkin's allegations lack the particularity required by Rule 9(b).

Under Federal Rule of Civil Procedure 9(b) ("Rule 9(b)"), a plaintiff must plead each of the elements of a fraud claim with particularity, i.e., a plaintiff "must set forth *more* than the neutral facts necessary to identify the transaction." Cooper v. Pickett, F.3d 616, 625 (9th Cir. 1997) (emphasis in original). In other words, fraud claims must be accompanied by the "who, what, when, where, and how" of the fraudulent conduct charged. Vess v. Ciba-Geigy Corp., USA, 317 F.3d 1097, 1106 (9th Cir. 2003). A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations. Moore v. Kayport Package Express.

Inc., 885 F.2d 531, 540 (9th Cir. 1989). While statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient. (Id.)

Cadkin's Complaint is pled with sufficient particularity with respect to the allegations concerning William Loose. May-Loo points to the conclusory language in paragraph 20 of the Complaint. That paragraph, on its own, would certainly be insufficient. However, the Complaint provides substantial detail of the fraud alleged elsewhere. Cadkin alleges that "William Loose, after first removing the GRH name as publisher and then in many instances Cadkin's name as an author, incorporated the GRH catalogue into the May-Loo Music Library and other libraries he controlled." (Complaint ¶ 21.) Three exhibits to the Complaint provide examples of three library catalogue sheets wherein Loose allegedly removed references to Cadkin and replaced them with himself. (Complaint, Exs. C-E.) The Complaint describes how Loose allegedly submitted cue sheets to BMI that omitted Cadkin's name as composer, and the resulting royalties and license fees Loose received. (Complaint ¶ 22.)

However, the Complaint lacks the requisite specificity regarding the named defendants. There are no details concerning the time, place, or nature of any alleged fraudulent activities of Irma Loose, May-Loo Music, Inc., Terence Loose, as trustee of the William Loose Family Trust, or Does 1 though 10. William Loose is not a defendant in this case.

Accordingly, this portion of May-Loo's motion is granted without prejudice.

D Summary Judgment

Though May-Loo's opening brief is styled as a "motion to dismiss and/or for summary judgment," its motion presents arguments relevant only to a motion to dismiss. In addition, Terence Loose, in his reply brief, denies that a motion for summary judgment has been initiated by either himself or co-Defendants May-Loo Music, Inc. and Irma Loose. (Reply 7-8.) The Court, as a result, will treat the motion as a motion to dismiss.

E. Copyright registration

May-Loo contends that, under Section 411(a) of the Copyright Act, only those who have registered their claim, or requested the issuance of a copyright registration, may sue for infringement. This argument is consistent with the plain meaning of the statute, and with judicial interpretation of it. 17 U.S.C. § 411 ("no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title"); In re World Auxiliary Power Co., 303 F.3d 1120, 1126 (9th Cir. 2002) ("an owner must register his copyright as a condition of seeking certain infringement remedies").

The Complaint states that Don Great Music registered the compositions and recordings in issue with the U.S. copyright office. (Compl. ¶ 43.) The Complaint also alleges that Cadkin is the owner of the resulting copyright certificates. (Compl. ¶ 44.) May-Loo contends that Cadkin "kept his right to collect and receive the 'writers share' of any royalties generated under the Publishing Agreement" with Don Great Music. (Opening Br. 1.) This is more, therefore, than a bare assignment of a right to sue.[5] Assuming that Cadkin's allegations are true, the works in issue were registered with the Copyright Office in compliance with Section 411(a) of the Copyright Act, and Cadkin possesses a greater ownership interest than the mere right to sue.

This portion of May-Loo's motion is accordingly denied.

F. Res Judicata

In order to bar a later suit under the doctrine of res judicata, an adjudication must (1) involve the same "claim" as the later suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies. Nordhorn v. Ladish Co., Inc., 9 F.3d 1402, 1403 (9th Cir 1993).

The third prong requires that the prior adjudication must have involved the same parties or those in privity with them. If the prior adjudication involved different parties, as it does here, the privity required must be one of "substantial

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5 In this Circuit, a "bare assignment of an accured cause of action is impermissible under 17 U S.C § 501(b)." Silvers v. Sony Pictures Entertainment, Inc., 402 F.3d 881, 890 (9th Cir. 2005).

identity" between the parties; the parties' interests must be so closely aligned that the party in the prior case acted as a "virtual representative" to the party in the instant case. U.S. v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (1980).

The similarity of interests required by res judicata is not satisfied here. As described above, Cadkin allegedly did not convey its entire ownership interest to Don Great Music. May-Loo has not alleged that the relationship between Cadkin and Don Great Music was such that Don Great Music constituted a "virtual representative" of Cadkin in the prior action.

Accordingly, this portion of May-Loo's motion is denied.

G. Preemption

May-Loo contends that Cadkin's state law claims are preempted by federal copyright law. Section 301 of the Copyright Act creates a two-part test for preemption. Del Madera Properties v. Rhodes and Gardner, Inc., 820 F.2d 973, 976 (9th Cir. 1987). First, the works in issue here "must come within the subject matter of copyright as defined in Sections 102 and 103 of the Copyright Act. Second, the rights granted under state law must be 'equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 of the Copyright Act.'" Id. (internal citations and quotations omitted).

Under the first requirement, Cadkin's claims, as Cadkin states them, come within the subject matter of the Copyright act. Under the second requirement, May-Loo contends that each of Cadkin's state law claims are equivalent to those rights protected by the Copyright Act. Cadkin fails to dispute whether any of its state law claims are equivalent to the exclusive rights within the scope of the Copyright act. The Court agrees with May-Loo that each of Cadkin's state law claims - declaratory relief regarding authored works, unfair competition, violations of California Civil Code section 980, and an alternative claim for declaratory relief and accounting - are not qualitatively different than copyright infringement. The claims are accordingly preempted. See Madiun Record Corp. v. Hormel 657 F. Supp. 1236, 1241 (C.D. Cal. 1987).

This portion of May-Loo's motion is granted.

III. CONCLUSION

For the aforementioned reasons, the Court:

1 Orders Cadkin to join Carbert Music Inc., Carlin Recorded Music Library Ltd., Don Great, Don Great Music, and Tinseltown, Inc.;

2 Denies May-Loo's motion with respect to lack of subject matter jurisdiction and res judicata contentions; and

3 Grants May-Loo's motion with respect to Cadkin's state law claims and fraud claims, and accordingly dismisses those claims without prejudice.

Cadkin has twenty days from the issuance of this Order to file an amended pleading.